United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2024

To be argued by SHIRLEY BACCUS-LOBEL

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

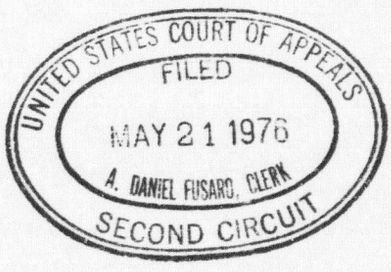
CARMINE J. PERSICO, JR.,
APPELLANT

v.

UNITED STATES OF AMERICA,
APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE



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BRIEF FOR APPELLEE

ISSUE PRESENTED

Whether, when a sentence has been imposed pursuant to the parole eligibility provisions of 18 U.S.C. 4208(a)(2), a district court retains jurisdiction to reduce that sentence at any time prior to its expiration.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 4208 provided:

> (a) upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in

in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than, but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine.

(b) If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment; and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section.

(c) Upon commitment of a prisoner sentenced to imprisonment under the provisions of subsection (a), the Director, under such regulations as the Attorney General may prescribe, shall cause a complete study to be made of the prisoner and shall furnish to the board of parole a summary report together with any recommendations which in his opinion would be helpful in determining the suitability of the prisoner for parole. This report may include but shall not be limited to data regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent. The board of parole

may make such other investigation as it may deem necessary.

It shall be the duty of the various probation officers and government bureaus and agencies to furnish the board of parole information concerning the prisoner, and, whenever not incompatible with the public interest, their views and recommendations with respect to the parole disposition of his case.

(d) The board of parole having jurisdiction of the parolee may promulgate rules and regulations for the supervision, discharge from supervision, or recommitment of paroled prisoners.

18 U.S.C. 4202 provided:

A Federal prisoner, other than a juvenile delinquent or a committed youth offender, wherever confined and serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years.

Rule 35, F. R. Crim. P.:

CORRECTION OR REDUCTION OF SENTENCE

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

STATEMENT

Following his conviction for conspiracy and obstruction of commerce by robbery from an interstate shipment, in violation of the Hobbs Act, 18 U.S.C. 1951, appellant was sentenced on June 6, 1969, to concurrent terms of fourteen and nine years' imprisonment, respectively, pursuant to the parole eligibility provisions of 18 U.S.C. 4208(a)(2).[1/] Appellant began serving this sentence on January 27, 1972.[2/] Appellant applied to be

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1/ The crimes for which appellant was convicted occurred in 1959. The indictment against him and five co-defendants was returned April, 1960. The first trial ended in a jury disagreement. Appellant's convictions on both counts at the second trial in June, 1961, were reversed on appeal. United States v. Persico, 305 F.2d 534 (1962). The third trial in 1963 resulted in a mistrial as to appellant and two codefendants; the mistrial was ordered when appellant was shot on a Brooklyn street. Appellant's conviction following a fourth trial in 1964 was reversed on appeal. United States v. Persico, 349 F.2d 6 1965). Appellant and the other defendants were tried a fifth time in April and May of 1968. Thereafter, following a mandamus petition, this Court ordered the trial court to enter judgments on the jury verdicts of guilty. United States v. Dooling, 406 F.2d 192, cert. denied, 395 U.S. 911 (1969). Appellant appealed these convictions, which were affirmed. United States v. Persico, 425 F.2d 1375 (1970), cert. denied, 400 U.S. 869 (1970).

In October 1970, appellant moved for a new trial on the ground of newly discovered evidence. The motion was denied, and this Court affirmed the order of the district court. United States v. Persico, 454 F.2d 721. In January, 1972, appellant again moved for a new trial. The motion was denied by the district court, and this Court affirmed. United States v. Persico, 467 F.2d 485 (1972), cert. denied, 410 U.S. 946.

2/ Following commitment and study, appellant was classified as a special offender. See 18 U.S.C. 4208(c). Appellant, who was initially incarcerated at the federal penitentiary in Atlanta, Georgia, is presently confined at the federal penitentiary in Marion, Illinois, where he was transferred in April, 1972.

released on parole and was initially considered for parole in or about June , 1972. At that time he was continued without parole until April, 1975 (A. 232).[3] In March, 1975, appellant received written notification from the Board of Parole that a hearing in his case would be conducted in April, 1975. He was also notified that a representative of his choosing could appear at the hearing and make a statement in his behalf or that he could waive such representation and make a statement himself (A. 245). On April 14, 1975, appellant's case was designated as an "original jurisdiction matter" (A. 260)[4] and was heard by the Regional Director and three National Board members, with

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3/ "A." refers to appellant's appendix.

4/ Prior to appellant's parole consideration, his Bureau of Prisons case worker prepared a prison progress report, including a description of appellant's institutional adjustment and an evaluation. The report recommended that an "en banc parole hearing" be conducted in appellant's case "in view of the notoriety of this particular case" (A. 141-143). Appellant thereafter filed a petition pursuant to 28 U.S.C. 1361 and 2201 in the United States District Court for the District of Columbia, seeking to enjoin the United States Parole Board from referring appellant's case for "en banc consideration" until all adverse material in his file had been disclosed and he had been afforded an opportunity to respond and controvert the basis for "en banc referral." Appellant also sought disclosure of all material, including his presentence report, which would be before the Board of Parole when it considered his case and a ruling requiring the Board to inform him as to all reasons for a denial of parole in the event of such a denial prior to "en banc consideration" (A. 239-243, 249-258). On April 2, 1975, the United States District Court for the District of Columbia entered an order transferring the matter to the Eastern District of Illinois, the district where appellant is confined (A. 259). It is not clear what the prison case worker meant by the term "en banc parole hearing"; he may have been referring to "original jurisdiction." See note 5, infra.

the result that on April 28, the application for parole was denied and the case was continued for an institutional review hearing in April, 1978 (A. 261-262).[5/] The following reasons for the Board's decision were included in the notice sent to appellant (ibid.):

> Your offense behavior has been rated as very high severity. You have a salient factor score of 5.[6/] You have been in custody a total of 38 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of 45-55 months to be served before release for cases with good institutional program performance and adjustment. After careful consideration of all relevant facts and information presented, it is found that a decision outside the

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5/ Although the papers submitted to the court below and included in appellant's appendix do not entirely clarify the matter, it is reasonable to assume that the following procedure, applicable at the time, was followed. Appellant's case was initially heard by two hearing examiners designated by the Board [28 C.F.R. 2.13 (1975)], who recommended to the Regional Director that he designate the case an an "original jurisdiction" case. The Regional Director did so designate the case which then was heard by the Director and three National Board members (28 C.F.R. 2.17), who denied the application for parole, having concluded that a decision outside the Board's guidelines, under 28 C.F.R. 2.20(c), was warranted (A. 260-262).

6/ The salient factor score is predicated upon offender characteristics and is intended to provide a parole prognosis. The Board's guidelines indicate a customary range of time to be served which is predicated upon a combination of offense severity and offender characteristics (salient factor score). [A. 263, 267]. See United States v. Slutsky, 514 F.2d 1222, 1226-1228 (2nd Cir. 1975).

> guidelines at this consideration appears warranted. There is not a reasonable probability that you would live and remain at liberty without violating the law because of your long criminal history. Board policy limits a continuance to not more than 36 months without review. Your continuance has been limited by this policy. Your offense was part of a large scale or organized criminal conspiracy or an ongoing criminal enterprise. An unusually sophisticated or professional manner was evident in the planning or commission of the offense. It is believed that you are a poorer parole risk than indicated by the salient factor score.

The decision of the Regional Directors was appealed and the full Board [28 C.F.R. 2.27(a)] affirmed the decision on October 15, 1975 (A. 266).[7/]

In December 1975, appellant filed a motion for correction and reduction of sentence pursuant to 28 U.S.C. 2255 in the United States District Court for the Eastern District of New York (Dooling, J.), which is the court which sentenced appellant (A. 102-140, 168-168). The court heard argument on the motion on February 6, 1976 (A. 169-231). On February 20, the court issued its memorandum and order denying appellant's motion (A. 232-236). This appeal followed.

7/ The Board did, however, adjust appellant's salient factor score to 7, which indicates a range of 36 to 45 months to be served before release for cases with good institutional performance and adjustment. Thus, at the time of the full Board's affirmance of the decision, appellant had been incarcerated almost 45 months.

ARGUMENT

THE COURT BELOW WAS WITHOUT JURISDICTION TO REDUCE APPELLANT'S SENTENCE

A. INTRODUCTION

At the outset, we point out that appellant is asking this Court to grant a form of relief which was never requested from the district court. Thus not only does appellant seek a remand to the district court for an immediate reduction of his sentence on the ground that the district court retains jurisdiction to reduce his concededly lawful sentence at any time by virtue of having sentenced him pursuant to 18 U.S.C. 4208(a)(2). (We think it clear that the district court has no such power at this juncture and our arguments on this point are set forth below.) Appellant is also taking a position not asserted below. Contending on numerous grounds that his rights under the Due Process Clause of the Fifth Amendment have been abridged by the Board of Parole and the Bureau of Prisons, appellant is asking this Court, pursuant to 28 U.S.C. 1361, to order the Board of Parole to effectuate his immediate release on parole (Br. at 29). As noted, appellant at no time sought such relief from the district court and in fact expressly disavowed any such course of action (A. 102-106).

In his Supplemental Memorandum of Law in support of his motion in the district court appellant stated as follows: "Persico does not ask this Court to 'review' the action of the

to the discretion of the Parole Board. This is what the statute

United States Board of Parole with respect to ordering the said United States Board of Parole to do or to refrain from doing anything -- but rather requests this Honorable Court to note the actions of the United States Board of Parole in this matter in light of the Court's continuing shared responsibility with the Executive Branch of the Government in determining the length of incarceration of the defendant-prisoner incarcerated under authority of 18 U.S.C. 4208(a)(2)" [A. 163-164]. At the hearing on appellant's motion, this position was reiterated. His counsel advised the district court as follows (A. 172-173):

> We ask that the court today invoke its authority and correct this situation, not by overruling the United States Board of Parole or by directing the United States Board of Parole to do or not do anything, but rather, consistent with its continuing jurisdiction under 18 U.S.C. 4208(a)(2) and 28 U.S.C. 2255, by resentencing Mr. Persico to a length of incarceration as intended by the court when it first sentenced him and (sic) under 18 U.S.C. 4208(a)(2).

Having expressly declined in the district court to seek any form of relief which would either enjoin or direct the actions of the Board of Parole, appellant is foreclosed from seeking such relief for the first time from this Court. See Trans World Airlines, Inc. v. Hughes, 332 F.2d 602, 613-614 (2nd Cir. 1964), certiorari granted, Hughes Tool Co. v. Trans World Airlines, Inc., 379 U.S. 912, cert. dismissed, 380 U.S. 248, 249. This is particularly true in view of the nature of the remedy sought, which would require the resolution of factual questions which the court below found it unnecessary

Accordingly, we believe the court in Kortness was

to reach in order to resolve the issue which appellant did present to that court. See, e.g., DeMarco v. United States, 415 U.S. 449 (1974); Terkildsen v. Waters, 481 F.2d 201, 204-205 (2nd Cir. 1973); List v. Fashion Park, Inc., 340 F.2d 457, 461 (2nd Cir. 1965), cert. denied, 382 U.S. 811. In any event, for reasons which are set forth in Part C of our Argument, we believe that appellant's remedy, if he has one, should be sought in the district of confinement (the Eastern District of Illinois) since he is challenging the procedures of the Board of Parole and the Bureau of Prisons.

B. THE LEGISLATIVE INTENTION WITH RESPECT TO 18 U.S.C. 4208

Appellant's contention that the court below has "continuing jurisdiction" to reduce a lawful sentence imposed pursuant to 18 U.S.C. 4208(a)(2) is predicated in large part upon statements regarding the intent of that section. Accordingly, as a preliminary matter we are setting forth the critical legislative history of 18 U.S.C. 4208.

1. Section 4208(a) was intended by the Congress to introduce into federal criminal law the concept of indeterminate sentencing. Grasso v. Norton, 520 F.2d 27, 32 (2nd Cir. 1975). The concern which prompted Congress to provide for indeterminate sentencing at the discretion of the trial court was the wide disparity in sentences received for similar offenses committed by offenders of comparable backgrounds. Congressional study of the problem revealed both excessive sentences and -- just as frequently -- sentences which were too short. H. Rep. 1946,

85th Cong., 2d Sess, pp. 3-4, 6-8; Report to the Comm. on the Judiciary, H. of Repr., 85th Cong., 2d Sess., Federal Sentencing Procedures (Feb. 15, 1958), pp. 3-5; Sen. Rep. 2013, 85th Cong., 2d Sess., pp. 4-6; Hearing before Subcommittee 3 of the Comm. on the Judiciary, H. of Repr., 85th Cong., 2d Sess. (April 30, 1958), pp. 46-49, 55-67, 69; Remarks of Representative Emanuel Cellar, 104 Cong. Rec. 13393 (July 10, 1958).[8/] Thus, the House Report on this legislation concluded that "while disparities seem unjust to the individual offenders who receive these penalties, the chief victim of the consequent effect is the general public, whose welfare has not been safeguarded by sentences which do not adequately or equitably serve the purposes of punishment, deterrence, incapacitation, or rehabilitation." H. Rep. 1946, supra, p. 7.

Congress believed that indeterminate sentencing would achieve a greater uniformity with respect to periods of incarceration by committing the decision as to actual time served to the Board of Parole. The statute in its entirety was intended "to provide Federal judges with additional information, services, and sentencing procedures which [would] enable them to impose upon convicted Federal offenders sentences that are equitable, flexible, and sufficiently long to fulfill more fully their functions of protecting the

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8/ Representative Cellar was the chief sponsor of this legislation.

under Section 4208(a)(2) to reduce a lawful sentence and that

public safety." H. Rep. 1946, supra, p. 3. See also, Sen. Rep. 2013, supra, pp. 4-5, 14; Federal Sentencing Procedures, supra, p. 3; Remarks of Representative Cellar, 103 Cong. Record 13231 (July 31, 1957), 104 Cong. Rec. 13392-13393 (July 10, 1958). Thus, the alternatives provided by 18 U.S.C. 4208(a) were intended to enable the federal courts to "give the Board of Parole greater latitude in a particular case" where use of the flexible parole eligibility provisions was deemed appropriate. Statement of the House Managers, H. Rep. 2579, 85th Cong., 2d Sess., p. 2.

It is entirely clear that the Congress did not anticipate that the terms of incarceration actually served would be generally reduced as a result. On the contrary, there was an expectation -- based largely upon the experiences of the States -- that sentences actually served might be greater as a consequence of indeterminate sentencing, although sentencing disparities were expected to decline as a result. H. Rep. 1946, supra, p. 11; Sen. Rep. 2013, supra, p. 5, Remarks of Representative Cellar, 104 Cong. Record 13392.

Section 4208(a)(1) permits the sentencing court to specify that a prisoner shall become eligible for parole at a certain point prior to the expiration of one-third of the sentence, at which time federal prisoners generally become eligible for parole (18 U.S.C. 4202). This provision was intended for the more hopeful case, in which a term of incarceration appeared warranted but in which factors available at the time of sentencing indicate a favorable prognosis for

of the Constitution or laws of the

early release on parole. H. Rep. 1946, supra, p. 9; Federal Sentencing Procedures, supra, p. 13; Remarks of Representative Cellar, 104 Cong. Record 13392 (July 10, 1958); Statement of Senator Hemmings, 104 Cong. Rec. 12752 (July 1, 1958). Section 4208(a)(2), on the other hand, was intended to provide more flexible parole eligibility terms in the doubtful case, that is, the case in which the rehabilitative prospect is poor.[9/] In such cases, the Congress believed it was providing the district courts with a tool whereby fairly lengthy sentences could be imposed where warranted without thereby extending the term of incarceration which must be served prior to parole eligibility. H. Rep. 1946, supra, p. 3, 9; Remarks of Representative Cellar, 104 Cong. Record 13392 (July 10, 1958); Statement of Senator Hennings, 104 Cong. Rec. 12752 (July 1, 1958).[10/]

9/ During debate on the proposed legislation, the view was expressed that under Section 4208(a)(2) a judge could prevent automatic consideration for parole in the case of a seasoned criminal after service of one-third of the sentence by leaving the matter of eligibility entirely to the Board of Parole. Remarks of Representative Keating, 104 Cong. Record 13393. (July 10, 1958). Section 4208(a)(1) expressly provides that the minimum term at which the prisoner shall become eligible for parole can be no more than one-third of the maximum sentence imposed. There is no similar qualification to Section 4208(a)(2). However, this Court has held that prisoners sentenced under that section can be given no less effective and meaningful parole consideration than prisoners whose eligibility is governed by 18 U.S.C. 4202. Grasso v. Norton, 520 F.2d 27 (1975).

10/ Congress solicited and received 195 responses from federal district judges with respect to these provisions. The response was almost entirely favorable, except that many judges did not believe the legislation went far enough. The view was repeatedly expressed that the minimum one-third service of sentence required to achieve parole eligibility (18 U.S.C. 4202) should be dispensed with entirely on the theory (CONT'D)

Another important feature of this legislation, embodied in 18 U.S.C. 4208(b), is the provision whereby a court may commit a convicted offender to the custody of the Attorney General for a period of three months (or six months if the court grants an extension) so that a complete study may be conducted in order to facilitate the court's sentencing function in particularly difficult or complex cases. This provision was intended to modify the effect of Rule 35, F. R. Crim. P., which at that time limited the period within which the sentencing court could reduce or modify a lawful sentence to 60 days following imposition of sentence, or the court's receipt of the mandate of the court of appeals, or entry of any order or judgment of the Supreme Court.[11/] Recognizing that the courts were powerless to reduce or modify a lawful sentence after this period, Section 4208(b) was intented to permit a more deliberate consideration in exceptional cases. H.Rep. 1946, supra, pp. 9-10; Sen Rep. 2013, supra, p. 4; Statement of the House Managers, H. Rep. 2579, supra, p. 2; Statement of Senator Hennings, 104 Cong. Record, 12753 (July 1, 1958); Remarks of Representative O'Neill, 104 Cong. Rec. 13387 (July 10, 1958); Remarks of Representative Keating, 104 Cong. Record 13393

10/ (CONT'D) that the Bureau of Prisons and Board of Parole were better situated than district courts to determine when an offender should be released. Federal Sentencing Procedure, supra, pp. 67-68, 70-77, 80-82, 93 105, 107, 144; Sen. Rep. 2013, supra, p. 8; H. Rep. 1946, supra, p. 5.

11/ Rule 35 was amended in 1966 to extend the time period to 120 days.

(July 10, 1958); 104 Cong. Record 13400 (July 10, 1958).

2. In legislation which became effective May 14, 1976, the Board of Parole was abolished and replaced with a "United States Parole Commission" as an independent agency within the Department of Justice. Public Law 94-233, 90 Stat. 219-233. The Act amends title 18 of the United States Code by repealing chapter 311 (relating to parole) and inserting a new chapter 311, 18 U.S.C. 4201 through 4218.[12/]

12/ 18 U.S.C. 4206 provides that "[i]f an eligible prisoner has substantially observed the rules of the institution * * * to which he has been confined, and if the Commission *** determines" that his release would not depreciate the seriousness of his offense or promote disrespect for the law, and that "release would not jeopardize the public welfare," the prisoner "shall be relased." This provision is qualified by Section 4206(c), which allows the Commission to "grant or deny release on parole notwithstanding the guidelines referred to * * * [above] if it determines there is good cause for so doing." In order to exercise this discretion the Commission must give the prisoner a written notice of the reasons for the decision and must provide the prisoner "a summary of the information relied upon." After serving two-thirds of his sentence (or 30 years, whichever comes first) a prisoner "shall" be released without respect to the criteria already described, except that "the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules or regulations or that there is a reasonable probability that he will commit any * * * crime." The act provides that each inmate shall be afforded a personal hearing at least every two years on and after the date of his eligibility for release. 18 U.S.C. 4208(h). He is entitled to appear in person and to testify (18 U.S.C. 4208(e)) he may be accompanied by a representative (18 U.S.C. 4208(d)(2)); the Commission must give him notice of the hearing and make available to him any file or report to be used in making its decision. 18 U.S.C. 4208(b). A record of the hearing must be kept and, if parole is denied, the prisoner is entitled to a personal conference with the responsible examiner or Commissioner at which the reasons for denial would be explained. 18 U.S.C. 4208(f) and (g).

18 U.S.C. 4202 has been repealed. 18 U.S.C. 4205(a) provides as follows:

> Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

Former Section 4208(a)(1) is now incorporated in its original form in 18 U.S.C. 4205(b)(1). Former Section 4208(a)(2) is incorporated in substantially the same form in 18 U.S.C. 4205(b)(2), which provides:

> the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

Former Section 4208(b) is incorporated in substantially the same form in 18 U.S.C. 4205(c). The provisions of former Section 4208(c) -- which required the Director of the Bureau of Prisons to conduct upon commitment a complete study of any prisoner committed under Section 4208(a) and to submit a summary report along with recommendations to the Board of Parole -- is now applicable to all prisoners. 18 U.S.C. 4502(d). A new subsection has been added which had no counterpart in former Section 4208. 18 U.S.C. 4205(g) provides:

> At any time upon motion of the Bureau of Prisons, the court may reduce any minimum term to the time the defendant has served. The court shall have jurisdiction to act upon the application at any time and no hearing shall be required.

C. THE DISTRICT COURTS ARE WITHOUT JURISDICTION TO REDUCE OR MODIFY A LAWFUL SENTENCE AFTER THE TIME PERIOD SPECIFIED IN RULE 35, F. R. CRIM. P.

Appellant's primary contention here - and the sole basis on which he sought relief from the court below - is that Section 4208(a)(2) confers upon the sentencing court "continuing jurisdiction" to reduce or modify a lawful sentence. As we show, this position is contrary to the express jurisdictional limitations of Rule 35, F. R. Crim. P.; moreover, nothing in the language or history of Section 4208(a)(2) supports the view that that section was intended to operate as an exception to the Rule's limitations.

1. Rule 35 clearly provides that a motion for reduction or modification of a lawful sentence may be brought only within 120 days after imposition of sentence, or receipt of the mandate of the court of appeals, or an order of the Supreme Court denying review or effectively upholding the judgment of conviction. This limitation is jurisdictional in effect so that after expiration of the 120-day period the district court is without power to reduce or modify the lawful sentence. In United States v. Ellenbogen, 390 F.2d 537 (1968), cert. denied, 393 U.S. 918, this Court noted the jurisdictional effect of Rule 35 and made the following observations with respect to the power of the district courts regarding reduction of sentences (at 540-541):

> The power to reduce [a sentence] is an inherent power of the court and is one aspect of the control which a court retains over a judgment which it has entered. [citation omitted]. Originally that power was held to expire at the end of the term of court at which the sentence was imposed. [citation omitted]. But since the adoption of the Federal Rules of Criminal Procedure in 1946, and the abrogation of any effect of the expiration of term of court, see Rule 45(c), the provisions of Rule 35 have governed the expiration of the power to reduce sentences in the federal system. The time limitation stated in Rule 35, first 60 days, now 120 days, is jurisdictional and cannot, under any circumstances, be extended by order of the court. Criminal Rule 45(b) [13/]; United States v. Robinson, 361 U.S. 220, 226, 80 S. Ct. 282, 4 L. Ed. 259 (1960). [emphasis added].

And see, e.g., United States v. Robinson, 457 F.2d 1319 (3rd Cir. 1972); United States v. Granville, 456 F.2d 1073 (5th Cir. 1972).[14/]

It is therefore manifest that the court below had no jurisdiction at this juncture to reduce or modify the lawful

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13/ Rule 45(d), F. R. Crim. P., which permits the district courts to enlarge the time periods specified by the Rules, expressly excludes from its coverage Rule 35 (and certain other provisions).

14/ "(J)urisdictional statutes are to be construed with precision and with fidelity to the terms by which Congress has expressed its wishes." Palmore v. United States, 411 U.S. 389, 396 (1973), quoting from Cheng Fan Kwok v. I.N.S., 392 U.S. 206, 212 (1968).

sentence which appellant received. This conclusion is unavoidable unless appellant can point to another provision by which Congress has expressly exempted a class of cases (which would include his) from the 120-day jurisdictional limit imposed by Rule 35.[15/] It is appellant's contention that Section 4208(a)(2) [now 18 U.S.C. 4205(b)(2)] is such an exception. We turn now to this claim.

2. The language of Section 4208(a)(2) in no manner expresses an intention to extend the jurisdiction of the sentencing court to reduce or modify a lawful sentence. To the contrary, the terms of the statute do not address the authority of the district courts in this regard at all. It is equally clear that the legislative history provides no basis on which to engraft upon Section 4208(a)(2) an exception to Rule 35. Nowhere in the fairly extensive legislative history of that section is there any suggestion that it would effectively constitute an exception to Rule 35. Had the proposed legislation been regarded as having such a significant effect, this undoubtedly would have been discussed-and certainly mentioned - in the reports, hearings or debates on these provisions. This is especially so in view of the extensive

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15/ In 18 U.S.C. 4205(g), supra at p. 16, for example, Congress has provided that a district court, upon motion of the Bureau of Prisons, may at any time reduce a minimum term of incarceration under the sentence imposed to the period of time the defendant has actually served. The provision goes on to expressly state that the court "shall have jurisdiction to act upon the application at any time * * *."

discussion of Section 4208(b) in relation to Rule 35, in which it was repeatedly noted that courts were powerless to reduce or modify a lawful sentence after the time period specified in Rule 35 (see supra at p. 14).[16] The history of Section 4208(a)(2) reveals instead that it was intended--not as a measure to enhance the authority of the district court to fix the sentence--but, rather, as a measure to enable a court at its discretion to provide the Board of Parole greater latitude in determining the actual term of incarceration served. It was expected that the use of this alternative would serve to reduce--not terms of incarceration, but unwarranted disparities in length of time served. See supra at pp.10-13.

This Court's decision in United States v. Slutsky, 514 F.2d 1222 (1975) does not suggest a contrary result. In that case, the defendants brought a timely motion for reduction of sentence under Rule 35 alleging that the sentencing court was unaware of the parole implications of the sentences imposed. While the case was pending on appeal, the Board of Parole

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16/ Section 4208(b) [now 18 U.S.C. 4205(c)] does not actually operate as an exception to Rule 35 but merely defers sentencing in order to avoid the time limitation of Rule 35. An order committing an offender for study under 4208(b) merely postpones action as to final sentencing. The actual imposition of sentence--from which Rule 35's 120-day period runs -- occurs when the court fixes sentence after having received the results of the study. United States v. Behrens, 375 U.S. 162 (1963).

published its new guidelines, which this Court believed would operate so as to afford the defendants parole consideration which would substantially depart from the reasonable expectations of the district court (id. at 1227-1228). This Court accordingly remanded the case to the district court for reconsideration of the motion to reduce under Rule 35 in light of the Board's recently published guidelines. It did so because there had been "a timely motion for reduction of sentence" and an opportunity for resentencing could easily recify any mistake which might have been made. Appellant, on the other hand, has not made a timely motion under Rule 35, and, in any event, his interests have not been compromised by the guidelines, as we argue infra. Appellant instead contends that the court had the authority under 28 U.S.C. 2255 to reduce a sentence imposed under Section 4208(a)(2). That general proposition is supported by the decision of the Eighth Circuit in Kortness v. United States, 514 F.2d 167 (1975), on which appellant relies.

The defendant in Kortness had been sentenced to three years' imprisonment under Section 4208(a)(2). Under the Board of Parole's then recently published guidelines, the period which the defendant should serve thereunder would expire very near the completion of his mandatory term. It had been determined that these guidelines were followed by the Board in 92-94% of all cases. There was accordingly no reasonable expectation that the defendant would receive serious consideration for parole release prior to or upon completion of one-third

of his sentence. This, the court of appeals concluded, contrasted with the probable expectations of the sentencing judge and therefore amounted to a "critical error" by the court in fixing sentence (id. at 170). The Court therefore ordered a remand to permit the court to exercise its full discretion with respect to sentencing.[17/]

We dispute the contention that the publication of guidelines by the Board of Parole after a sentence has been imposed under Section 4208(a)(2) constitutes a critical error of fact by the court in fixing sentence on the ground that it is improbable under the guidelines that the defendant will be afforded serious consideration for early release on parole.[18/] While Section 4208(a)(1), clearly intended for application with respect to the more hopeful case, embodies an expectation that a prisoner will be considered for early release, Section 4208(a)(2) has no other effect than to leave the matter entirely

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17/ Before the time for filing either a petition for rehearing or a petition for a writ of certiorari had expired in Kortness, the district court on remand declined to reduce the defendant's sentence, thereby rendering the cause moot.

18/ This Court in Slutsky did not reach this question, observing in this regard (514 F.2d at 1229): "An unfortunately mistaken assumption about the effect of a section 4208(a)(2) sentence perhaps does not rise to the level of a sentencing judge's mistaken impression of a defendant's prior criminal record."

to the discretion of the Parole Board. This is what the statute plainly says and any further expectation is unsupported by both the language and the history of that section. The publication of guidelines to be applied on the basis of offender and offense characteristics is clearly in furtherance of the primary goal of this legislation which was to reduce sentencing disparities--not length of time served. Indeed, the statute itself summarily reaffirms the largely unfettered discretion formerly committed to the Parole Board under 18 U.S.C. 4203. 18 U.S.C. 4208(d). That application of these guidelines would have the effect in a particular case of a denial of parole - before, at or after the one-third point - is simply irrelevant. Congress in its enactment of Section 4208 was concerned with sentencing disparity and Section 4208(a) was conceived as a method whereby actual length of incarceration would be committed to the parole authority in the expectation that sentencing disparity would be reduced as a consequence. The guidelines were published with that goal in mind and there is simply no warrant for the view that a sentence under 4208(a)(2) embodies an expectation for "serious consideration" of early release. This is particularly so since Section 4208(a)(2), unlike (a)(1), was regarded as an appropriate alternative with respect to the doubtful case.[19/]

19/ Indeed the response of numerous federal judges to this proposed legislation (supra at n. 10) suggests that many courts may routinely give sentences under Section 4208(a)(2) for no other purpose than to commit the decision as to actual time served completely to the discretion of the Bureau of Prisons (in an advisory capacity) and the paroling authority.

Accordingly, we believe the court in Kortness was plainly wrong in concluding, notwithstanding its recognition of the jurisdictional limits of Rule 35, that a motion for reduction could be brought under 28 U.S.C. 2255 because the court was laboring under a "critical error" with respect to parole possibilities at the time of sentencing. While a claim that the sentencing process "was infected with fundamental defects resulting in a miscarriage of justice" or was inconsistent "with rudimentary demands of fair procedures" is cognizable in a collateral attack proceeding [United States v. Malcolm, 432 F.2d 809, 815 (2nd Cir. 1970); cf., United States v. Huss, 520 F.2d 598, 603-604 (2nd Cir. 1975)], speculation as to the sentencing court's view of Section 4208(a)(2) does not rise to that level, even if it is assumed that serious consideration for early release on parole is a reasonable expectation.

It is in any event clear that the consideration afforded appellant cannot have been at odds with the expectations of the sentencing court. He can make no complaint that the sentencing court labored under a serious error of fact due to the Board's subsequently published guidelines when it sentenced him under Section 4208(a)(2). Appellant has twice been considered for parole prior to service of one-third of his term of incarceration [see Grasso v. Norton, 520 F.2d 27 (2nd Cir. 1975)], and a decision in his case has been rendered outside the guidelines. This is so because the Board has concluded that "(t)here is not a reasonable probability that (he) would

live and remain at liberty without violating the law * * *" (A. 262).[20/] Under 18 U.S.C. 4203, the Board of Parole is not authorized to release a prisoner on parole unless it concludes "that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society * * *." Thus, the parole process applicable to appellant in this regard could not have been contrary to the reasonable expectations of the sentencing court. When he committed appellant's release to the complete discretion of the Parole Board, the court knew by virtue of standards long embodied in the governing statute that appellant would not be released on parole unless the Board were able to conclude that he probably would remain at liberty without violating the law. Thus, even assuming that a vehicle for relief in the form of a reduction of sentence exists at this juncture, appellant has plainly presented no basis warranting such relief.

3. While we believe the only contention presented to the court below was whether there is "continuing jurisdiction"

20/ Appellant repeatedly states that his good institutional adjustment and performance have been ignored. However, it is clear that institutional performance and rehabilitation are by no means synonymous. Thus, a finding that appellant is unlikely to remain at liberty without violating the law is not in the least inconsistent with his good conduct record within the prison.

under Section 4208(a)(2) to reduce a lawful sentence and that this is accordingly the only issue properly before this Court for review, we also point out that to the extent that appellant is challenging the procedures of the Board of Parole and the Bureau of Prisons, he has selected the wrong forum.

It is clear under this Court's decision in United States v. Huss, 520 F.2d 598, 603-604 (1975), that a challenge to actions and procedures of the Bureau of Prisons and the Board of Parole should be brought in the district of confinement under 28 U.S. 2241, not in the sentencing court under 28 U.S.C. 2255.[21] This Court observed in this regard (id. at 603):

> The §2255 remedy was designed to meet the collateral attack problem, but not to transfer to the sentencing court the entire habeas corpus jurisdiction of the 1867 Act. Indeed, if we were to construe [§2255] as transferring to the sentencing court not only collateral attack litigation, but also litigation over conditions of confinement, we would be creating in reverse, the same kinds of administrative difficulties which §2255 was designed to avoid. Certainly §2241 is available to challenge a condition of custody which is 'in violation

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21/ Although Huss dealt with a challenge to the procedures of the Bureau of Prisons, the Court seemed to recognize that its reasoning applied as well to challenges directed at the Board of Parole. The Court stated in this regard: "Cases holding that a §2255 motion is not available to challenge parole board decisions, though not directly controlling, are closely analogous. See, e.g., Stinson v. United States, 342 F.2d 507 (8th Cir. 1965); Allen v. United States, 327 F.2d 58 (5th Cir. 1964); United States v. Hock, 275 F.2d 726 (3rd Cir. 1960)."

> of the Constitution or laws . . . of the United States ....' 28 U.S.C. §2241(c)(3). But if by virtue of §2255, such relief is also available before the sentencing court, remote from the usual places of confinement, that court will in most cases be confronted with the same kinds of logistical problems faced by district courts prior to [the enactment of §2255 in] 1948 in the district of confinement in collateral attack cases. [citation omitted]. 22/

The Court then went on to adopt with approval the following language from the decision of the Court of Appeals for the District of Columbia in Freeman v. United States, 254 F.2d 352, 353-354 (1958) [id. at 604]:

> Although a motion under Section 2255 may be utilized to attack a sentence which is 'in excess of the maximum authorized by law,' this refers only to the sentence as imposed, as distinct from the sentence as it is being executed. If appellant's sentence is being executed in a manner contrary to law . . . he may seek habeas corpus in the district of his confinement. Section 2255 is not broad enough to reach matters dealing with the execution of sentence . ... [emphases in original]

In our view, the reasoning expressed in Huss applies equally forcefully with respect to petitions for mandamus under 28 U.S.C. 1361. The same considerations prevail whether

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22/ Thus, in Grasso v. Norton, 520 F.2d 27 (2nd Cir. 1975), the relief sought was an order directing the Board of Parole to afford prisoners sentenced under Section 4208(a)(2) parole consideration at least as effective as that afforded to prisoners under 18 U.S.C. 4202, and the action was properly brought pursuant to 28 U.S.C. 2241 in the district of confinement.

relief is sought by way of habeas corpus or by mandamus. In either case, the appropriate forum for such challenges to the Board of Parole or the Bureau of Prisons is the district court in the district of confinement. The argument in this regard is nowhere better presented than in Judge Friendly's concurring opinion in Kahane v. Carlson, 520 F.2d 492, 496-500 (2nd Cir. 1975). There are, however, numerous reasons why this case is inappropriate for consideration of this issue. As noted previously, appellant did not seek mandamus relief from the district court. Thus, as this Court observed in United States v. Huss, supra, 520 F.2d at 605, in rejecting 28 U.S.C. 1361 as a basis for the exercise of its jurisdiction: "There was no mandamus respondent before the district court which would give that court jurisdiction over a genuine §1361 lawsuit (footnote omitted)." Moreover, while this Court in Kahane v. Carlson, entertained a mandamus petition against the Bureau of Prisons brought in a district other than the district of confinement, the majority expressly noted--in response to Judge Friendly's objections to this assumption of jurisdiction--that the action was appropriate since the petition there was in effect challenging a nationwide policy of the Bureau of Prisons. On the other hand, appellant's challenge with respect to the practices and procedures of the Board of Parole relates principally to the particular circumstances of his case. There is accordingly neither a basis nor a reason for this Court's assumption of jurisdiction under 28 U.S.C. 1361

CONCLUSION

For the reasons stated, it is respectfully submitted that the court below was without jurisdiction in this matter and that its order should therefore be vacated; in the alternative, the order of the district court denying appellant's motion pursuant to 28 U.S.C. 2255 should be affirmed.

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CERTIFICATE OF SERVICE

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